Supreme Court, U.S.
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No. 01-737

In The

Supreme Court of the United States

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

SECURITY LIFE INSURANCE COMPANY OF AMERICA and CONGRESS LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS QUESTIONS PRESENTED ARE PROPER

In commenting on the questions presented by Petitioner Transamerica Occidental Life Insurance Company ("Transamerica'), Respondents have failed to distinguish between the subpoena issued by the Clerk of the United States District Court for the Central District of California ("district court's subpoena") and the subpoena issued by the umpire of the arbitration panel sitting in Minnesota ("umpire's subpoena"). In *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000), the decision cited by Respondents, the Eighth Circuit only addressed issues with respect to the umpire's subpoena. Moreover, the Eighth Circuit only addressed the demand for the production of documents in the umpire's subpoena. The Eighth Circuit did not address any issues with respect to the district court's subpoena, nor did the Eighth Circuit address the issue of the demand for the testimony of a witness designated by Transamerica. With respect to the issue before the Ninth Circuit of whether it was proper for the district court's subpoena to have been issued compelling the testimony of a witness designated by Transamerica, the Eighth Circuit stated the following: *"This is a thorny question indeed,* presenting what may be a serious problem in the enforcement of witness subpoenas under the [Federal Arbitration Act]. . . . [W]e express no opinion about *the unusual procedure followed by the district court* for the enforcement of the panel's subpoena of Transamerica's employee." (Emphasis added.) *Id.* at 872.

It is important to note that Transamerica was never held in contempt pursuant to the contempt provisions contained in section 7 of the Federal Arbitration Act, 9

U.S.C. § 7, for failing to comply with the umpire's subpoena. Transamerica was held in contempt pursuant to the contempt provisions contained in Rule 45 of the Federal Rules of Civil Procedure for failure to comply with the district court's subpoena.

Contrary to the assertions of Respondents, the first three questions presented by Transamerica were clearly raised in Transamerica's Opening Brief filed in the Ninth Circuit. The first question presented was raised in Arguments D.3. and D.5.a. in Transamerica's Opening Brief. The second question presented was raised in Argument A. in Transamerica's Opening Brief. The third question presented was raised in Argument B. in Transamerica's Opening Brief.

Transamerica was clearly appealing the monetary sanctions assessed by the district court. Accordingly, the seventh question presented by Transamerica was clearly an issue before the Ninth Circuit.

With respect to the fifth question presented by Transamerica, Respondents assert that Transamerica had not properly objected to the demand for the production of documents in the district court's subpoena because Transamerica had not filed those objections with the district court. There is no basis for this assertion. Rule 5(d) of the Federal Rules of Civil Procedure provides, in part: "All papers *after the complaint* required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service. . . ." (Emphasis added.) There was never a complaint filed in

the district court. Indeed, on July 19, 1999, when Transamerica served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica, there was no action whatsoever that had been filed in the district court in which Transamerica could have filed those objections. An action was not commenced in the district court until August 27, 1999, more than a month after Transamerica had served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica. Moreover, assuming, arguendo, that there was an action in existence in the district court when Transamerica served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica, Local Rule 8.3(f) of the district court provides that such objections should not be filed.

Respondents assert that the sixth question presented by Transamerica is based on an "inaccurate rendition of the facts." The uncontroverted facts in this case are that the documents and witness in question were located in Charlotte, North Carolina. Given the distance between Los Angeles, California and Charlotte, North Carolina, the application of the territorial limits set forth in Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure is a proper question in this case.

In commenting on the fourth question presented by Transamerica, Respondents ignore the authority cited on page 19 of Transamerica's Petition for a Writ of Certiorari. Moreover, Respondents dismiss, without any basis, the examples of disputed material facts in this case delineated on page 18 of Transamerica's Petition for a Writ of Certiorari. The issue of contempt was never before the

Eighth Circuit. Moreover, the Eighth Circuit never addressed any issue relating to the district court's subpoena. Therefore, the disputed material facts raised by Transamerica were never addressed by the Eighth Circuit either in the context of the issue of contempt or in the context of the district court's subpoena. Contrary to the assertions of Respondents, there is nothing frivolous about the fourth question presented by Transamerica.

CONCLUSION

Each of the questions presented by Transamerica are proper questions for this Court to consider. Moreover, they are important questions for this Court to consider because they deal with the extent and limits of the subpoena power that is available in arbitration proceedings subject to the Federal Arbitration Act. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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